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What Are and Are not Constitutional Issues in Administrative Hearings

Course Description

In many administrative hearings, lawyers and parties raise constitutional arguments. In this session, long time NAHO faculty members, Professor Greg Ogden, Peter Halbach and Jim Gerl will offer their insights and opinions as to how hearing officers can and should get involved. Practical examples of constitutional objections and how they should be handled will be explored by this diverse and experienced panel. Thanks are given to the Hon. Toni Boone (Retired) for permitting the use of some of her materials in these course materials.

Ruling on constitutional issues

- Can ALJ's [hearing officers] rule on constitutional issues? **The answer is it depends**
- 1. Implied consent issues decided by DMV ALJ's[hearing officers] address 4th amendment concerns.
- 2. Some ALJ's [hearing officers] will not consider constitutional issues at all, or will refer the parties to the court system to raise those issues.
- 3. Some states (California is one) prohibit administrative agencies from declaring a statute unconstitutional (Cal. Const., art. 3, Section 3.5).
- 4. Some ALJ's [hearing officers] will allow a party to make a record for an as applied challenge that will be resolved by the courts on judicial review.

Implied consent hearings 1

An issue common to most of these hearings is whether there were reasonable grounds (probable cause) to believe a person was driving or in actual physical control of a vehicle while under the influence of intoxicating liquor or drugs. Frequently, even the law enforcement officer's contact is challenged on 4th Amendment grounds. We do make determinations of these issues.

Very recently, the U.S. Supreme Court considered a number of Minnesota and North Dakota cases together and issued its opinion in Birchfield v. North Dakota, 579 U.S. _____ (2016), on June 23, 2016, holding the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving, but not warrantless blood tests. The court, however, distinguished between criminally punishing a motorist for refusing to submit to a blood test and the imposition of civil penalties and evidentiary consequences on motorists who refuse to comply with testing under Implied Consent laws. That opinion indicates nothing in Birchfield should be read as casting doubt on the constitutionality of Implied Consent laws. In the companion case, Beylund v. Levi, where the driver consented to the blood test and the license was administratively suspended, the court not only remanded to see if the consent was voluntary, but also said our the North Dakota court will have to decide if the evidence obtained from the search must be suppressed, as the evidence is offered in an administrative hearing rather than in a criminal proceeding. The North Dakota court has previously held the constitutional protections available in criminal matters are not necessarily applicable in administrative proceedings and has refused to extend the exclusionary rule to civil proceedings. Holte v. ND State Highway Commissioner, 436 N.W.2d 250 (ND 1989); cf. Richter v. N.D. Department of Transportation, 2008 ND 105, 750 N.W.2d 430 (under ND Administrative Agencies Practices Act, a hearing officer "may" exclude evidence).

The exclusionary rule for alleged Miranda violations is not applicable to our administrative hearings. Other rights, i.e. the 6th Amendment right of confrontation, are applicable in criminal cases but not in administrative hearings. For example, in a criminal case there is a right to confront certain individuals involved the analysis of blood samples for alcohol concentration under a relatively recent U.S. Supreme Court case and Rules of Evidence have been modified to address the concern. This is not the same as the right to confront witnesses in an administrative hearing. Due process is the real issue in the administrative context.

Due Process 1

•In ***Wolff v. McDonald***, 418 U.S. 539, 94 S.Ct. 2963 (1974) the court held
•that procedures for due process may vary depending on the situation and
•that trial-like procedures are not always necessary. The hearing may be
•less than the full judicial model, but it must be "some kind of hearing"
•with the right to:

1. Notice of the hearing
2. Written charges
3. Opportunity to present evidence and call witnesses

•The *Wolff* court ***did not*** require a right of confrontation/cross-examination or the right to counsel.

Due Process 2

- The Court has extended the "entitlement" concept to many other kinds of cases in which a deprivation of "property" has been alleged. For example, a school cannot suspend a given student for alleged misconduct without affording the student at least a limited prior hearing, ***Goss v. Lopez***, 419 U.S. 565 (1975).

  The *Goss* court determined that the level of due process afforded in the hearing depends on the competing interests involved. They determined that requiring elaborate procedures would harm educational interests of all students in the school system, yet there must be some type of hearing due to the risk of error in suspending a student and the seriousness of the potential loss of an opportunity for education. An informal conference between the students and the principal was held in the school office. The Court held this was sufficient due process because the students received:

  1. An opportunity for confrontation (but no right to call or cross-examine witnesses and no right to counsel).
  2. Notice regarding the charges against them.
  3. An opportunity to present their version of events.

Due Process 3

- In ***Mathews v. Eldridge***, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18, (1976), the Court established an analysis technique for determining the level of due process which should be required in administrative proceedings. The *Mathews* three-part balancing test:
    1. What private interest will be affected?
    2. What is the risk of erroneous deprivation of the identified private interest?
    3. What is the cost to the agency in time, resources and money for additional procedural protection?
- Where there is little risk of an erroneous deprivation, a post-deprivation review is sufficient. Failure to grant a pre-deprivation hearing did not violate due process, *Mackey v. Montrym*, 443 U.S. 1, 99 S.Ct. 2612 (1979).

Due process 4

•*Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723 (1977) held that summary suspension or
•revocation of driving privileges, based on official records of the license of a motorist
•who has been repeatedly convicted of traffic offenses, with a full administrative hearing
•available only after the suspension or revocation has taken effect, comport with
•due process because, under the *Eldridge* criteria: The nature of the private interest
•involved is not so great as to require a departure from the ordinary principle that
•something less than an evidentiary hearing is sufficient prior to adverse
•administrative action;
•The risk of erroneous deprivation absent a prior hearing is not great and
•additional procedures would not significantly reduce
•the number of erroneous deprivations; and
•The requirement of a pre-termination hearing
•would impede the public interests of administrative efficiency
•as well as highway safety.

Due Process 5

- A. Hearing procedures required in the Goldberg decision:
- 1. timely and adequate notice
- 2. oral presentation of evidence
- 3. oral presentation of arguments
- 4. confronting adverse witnesses
- 5. cross-examining adverse witnesses
- 6. disclosure of opposing evidence
- 7. right to retain counsel
- 8. decision on the record of the hearing
- 9. statement of reasons for decision and discussion of evidence relied upon
- 10. impartial decision maker

Due process 6

- 1. The only hearing elements not included were the requirement of a hearing record and a judicial opinion.
- 2. Later courts characterized the Goldberg hearing procedures as being MAXIMUM PROCEDURES
- 3. The Goldberg decision judicialized the hearing procedures for most social welfare benefits agencies. Before Goldberg, most hearing officers were social workers. Over a period of time after Goldberg, most hearing officers were lawyers, and the administrative judiciary developed as a result.

Due process 7

- MINIMUM PROCEDURES
- 1. notice
- 2. statement of reasons
- 3. opportunity to respond (orally or in writing)
- 4. impartial decision maker
- This is the other extreme. This is typified by school discipline cases, such as Goss v. Lopez [419 U.S. 565(1975)](suspension of students for 10 days or less.)

4th Amendment 1

- A search for evidence under the 4th Amendment of the U.S. Constitution must be based on "probable cause." *Henry v. United States*, 361 U.S. 98 (1959) and *Bolin v. State*, 114 Nev. 503, 960 P.2d 784 (1998). The taking of blood from an individual triggers 4th Amendment protection. *Schmerber v. State of California*, 86 S.Ct. 1826, 384 U.S. 757 (1966). *State, Department of Motor Vehicles v. Torres*, 105 Nev. 448, 779 P.2d 959 (1989) defines "reasonable grounds" as a standard less than "probable cause." NRS 484C.160 demands a search on less than "probable cause" and thus violates the 4th Amendment. *Wong Sun v. United States*, 83 S.Ct. 407, 371 U.S. 471 (1963) held that the fruits of an unlawful search are inadmissible. If person refuses to take an evidentiary test, they can be forced to submit to a blood test. Evidence of the analysis of the blood sample should be suppressed on constitutional grounds.

4th Amendment 2

- The **Fourth Amendment to the U.S. Constitution** provides:
- "**the right of the people to be secure** in their persons, houses, papers and
- effects, **against unreasonable searches and seizures shall not be violated**;
- and no warrants shall issue, but upon probable cause, supported by oath or
- affirmation, and particularly describing the place to be searched and the persons or things to be seized…"
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- **The application and development of the Fourth Amendment in the area of administrative law has differed from the criminal law, even when law enforcement officers are involved. The following assortment of cases demonstrates the courts' position on the privilege involving the right to be free of unreasonable searches and seizures, specific to civil, administrative law.**
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4th Amendment 3

Frank v. Maryland, 359 U.S. 360 (1959)

The Supreme Court held that a warrant was not necessary when a health inspector, acting on a tip, sought to enter a home. The defendant was charged and convicted of a misdemeanor for refusing to admit the inspector pursuant to the Baltimore City Health Code. The conviction of the homeowner for failure to admit the health inspector was affirmed on the theory that a search warrant was only required in criminal actions.

B. *Camera v. Municipal Court*, 387 U.S. 523 (1967)

The Supreme Court reversed its position on administrative warrants and held that the Fourth Amendment required a warrant for the search of a dwelling.

C. *See v. Seattle*, 387 U.S. at 543.

The Supreme Court again reversed its position on administrative warrants and held that a business could not be entered for inspection without a search warrant.

4th amendment 4

D. *Marshall v. Barlow*, 436 U.S. 307 (1978)

An OSHA inspector attempted a search without a warrant. The Supreme Court affirmed the obligation to obtain a warrant and elaborated on the requirements necessary to acquire an *administrative* search warrant:

> "Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation, but also on a showing that reasonable administrative standards for conducting an inspection are satisfied with respect to a particular establishment".

The Supreme Court found that a unique problem existed with respect to **"closely regulated" businesses that had a long tradition of close government supervision**. In these instances, the Court ruled that **a search may be conducted *without* a search warrant because it was in the interest of the public to maintain close supervision.**

4th amendment 5

A. *Colonnade Catering Corporation v. United States*, 397 U.S. 72 (1970)
The Supreme Court recognized that "the liquor industry was long subject to close supervision and inspection" and allowed a search without a warrant pursuant to several federal revenue statutes authorizing the inspection of the premises of liquor dealers.

B. *United States v. Biswell*, 406 U.S. 311 (1972)
The Supreme Court allowed a warrantless inspection of the premises of a pawn shop operator who was federally licensed to sell sporting weapons. The court held that "the warrantless inspections authorized by the Gun Control Act would pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection."

4th amendment 6

C. *Donovan v. Dewey*, 452 U.S. 594 (1981)
The Supreme Court applied the "closely regulated business" exception to the warrant requirement to Federal Mine Safety and Health Act Inspections.

D. *New York v. Burger*, 482 U.S. 691 (1987)
The Court expanded the "closely regulated business" exception to also include the warrantless inspection of junkyards, and formulated a three-step approach to administrative inspections without search warrants:

1. There must be a substantial government interest that informs of the regulatory scheme pursuant to which the inspection is made.
2. The warrantless inspections must be necessary to further the regulatory scheme.
3. The statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant that advises the owner of the business that the search is being made pursuant to the l law, has a properly defined scope, and limits the discretion of the inspecting officers.

4th Amendment 7

A similar rationale (a search warrant is not necessary if there is a history of closely-regulated activity in the interest of public safety) has been applied to police **searches and seizures from automobiles**:

A. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 L.Ed.2d 412, 110 S.Ct. 2481 (1990): A "seizure" at a sobriety checkpoint is "reasonable" under the Fourth Amendment because:

•The sobriety checkpoint serves special government needs beyond the normal need for law
•enforcement and
•therefore it is impractical to require a warrant or some level of individualized suspicion before initiating
•the appropriate balancing test;
•The measure of intrusion on motorists stopped briefly at sobriety checkpoints is slight;
•The checkpoints are selected pursuant to guidelines and uniformed police officers every
•approaching vehicle so that the constitution defect of random stops is not applicable; and
•There is sufficient empirical data to support the effectiveness of the sobriety checkpoints in that approximately 1.5% of the drivers passing through the checkpoint were arrested for alcohol impairment.

4th amendment 8

B. A blood sample taken from an unconscious defendant before arrest did not constitute an illegal search and seizure under implied consent or the Fourth Amendment because exigent circumstances existed regarding rapidly dissipating blood levels. *Galvan v. State*, 98 Nev. 550, 655 P.2d 155 (1982).

4th amendment 9

1. *Mapp v. Ohio*, 367 U.S. 643 (1961) held that exclusion of illegally obtained evidence was the best way to deter law enforcement officers from violating the rights of citizens. Following *Mapp*, illegally obtained evidence was excluded from state administrative proceedings.

United States v. Janis, 428 U.S. 433 (1976): Balancing test was announced for purposes of applying the exclusionary rule where federal authorities seek to use evidence illegally obtained by state law enforcement officers. The probable deterrent effect of suppression is to be balanced against the need for the evidence.

The *Janis* "balancing test" was first expanded to the area of administrative law in *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1052 (1984) to allow illegally obtained statements in an immigration deportation proceeding even though the evidence was taken by the same agency of the same sovereign. In *Lopez-Mendoza*, the Court found the social costs of excluding the illegally seized evidence far outweighed any possible deterrent effect.

Lopez-Mendoza is now being used by states in holding that the exclusionary rule has no application whatsoever in administrative proceedings: *Diehl v. Iowa Beer and Liquor Control Dept. Hearing Commission*, 27 Pa. Commonwealth Ct. 125, 365 A.2d 700 (1976); *Stedronsky v. Sobol*, 572 N.Y.S. 2d 445 (N.Y. App. 1991); *Allen v. Louisiana State Board of Dentistry*, 531 So.2d 787 (La. App. 4th Cir. 1988).

4th amendment 10

•Other states are admitting illegally seized evidence in administrative proceedings
•where the agency seeking to use the evidence does not directly control the actions
•of the offending officer, such as in administrative license suspension hearings.
• The "deterrent" effect, in these cases, is the exclusion of the evidence in the criminal
•proceedings. See *Westendorf v. Iowa Dept. of Tranportation, Motor Vehicle Division*,
•400 N.W. 2d 553 (Ia. 1990) and *Commonwealth Dept. of Transportation v. Wysocki*,
•535 A.2d 777 (Pa. 1987) where the Pennsylvania court held that the legality of a stop
•was irrelevant because "the driver's guilt or innocence of a criminal offense is not at issue
•in the license suspension proceedings." In *Ascher v. Commissioner of Public Safety*,
•519 N.W.2d 183 (Minn. 1994), the Minnesota Court of Appeals did not discuss the
•balancing test as applied in *Janis* and *Lopez-Mendoza*. The *Ascher* court concluded that
•applying the exclusionary rule to exclude evidence that a petitioner had violated a
•condition of his licensure by driving under the influence of alcohol was
•inimical to public safety" and would not deter future unlawful police conduct
•to any significant degree.

5th amendment 1

The **Fifth Amendment to the U.S. Constitution** provides:

"No person…shall be compelled in any *criminal* case to be a witness against himself…"

A. 5th Amendment privileges, even in criminal trials, are limited to communication

1. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, at 1828 (1966)
   The United States Supreme Court held that blood extracted from a non-consenting suspect "although an incriminating product of compulsion, was neither his testimony nor evidence relating to some communicative act or writing by him."
2. *Doe v. United States*, 487 U.S. 201, 210 (1988)
   In "order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a witness against himself."

5th amendment 2

3. *Holt v. United States*, 218 U.S. 245 (1910)
   "The prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communication from him, not an exclusion of his body as evidence when… material."

Consequently, Fifth Amendment privileges cannot cover:

1. a defendant forced to put on a specific article of clothing to determine if it fits him.
2. a defendant forced to stand in a line up.
3. a defendant forced to give fingerprints.

•photographs of a defendant take while in custody.

5. removal of clothing or a toupee for identification purposes.
6. forced handwriting samples
7. speaking in a line-up for voice identification purposes.
8. reading a transcript to provide a speech/voice pattern.

5th amendment 3

B. Exceptions to Fifth Amendment exclusions:

1. *Baltimore City Dept. of Soc. Serv. v. Bouknight*, 493 U.S. 549, (1990)

A mother who had been accused of child abuse refused to produce the child at the order of the Department of Social Services, asserting her Fifth Amendment privilege against self-incrimination. The court found that the production of the child would be a testimonial act. However, the court held that the mother could not assert her privilege against self-incrimination once the child became the object of the state's regulatory interests. The mother had accepted custody of the child pursuant to a court order and, as such, she had submitted to the routine operation of the regulatory system. Since the order to produce the child was made for compelling reasons (the child's safety) unrelated to criminal law enforcement and as part of a broadly applied regulatory regime not directed at a selective group inherently suspect of criminal activities, the privilege could not be asserted. The order finding the mother in contempt of court for failure to produce the child was upheld.

5th amendment 4

2. *In re Lamonica H.*, 220 Cal. App. 3d 634, 270 Cal. Rptr. 60 (1990)
   As part of a court-ordered reunification plan, a father accused of sexually abusing his child was ordered to participate in therapy sessions. The father claimed this would compel him to incriminate himself. The court held that because the California Constitution requires immunity for a person making statements during therapy, the statements could not be used in criminal proceedings. Therefore, compliance with the court ordered therapy was not in violation with Fifth Amendment protections.
3. *Pennsylvania v. Muniz*, 496 U.S. 582, 110 L.Ed. 2d 528 (1990)
   The Supreme Court held that incriminating answers given to police in response to routine booking questions were not obtained in violation of a defendant's Fifth Amendment rights, even though he was not advised of his right to remain silent during the administration of booking and sobriety tests. The defendant's "answers to these first seven questions are nonetheless admissible because the questions fall within a 'routine booking question' exception which exempts from *Miranda*'s coverage questions to secure the biographical data necessary to complete booking or pretrial services."

5th amendment 5

D. The 5th Amendment Privilege Applied to administrative license suspensions

1. *South Dakota v. Neville*, 459 U.S. 553, 74 L.Ed.2d 748, 103 S.Ct. 916 (1983)

a. Admission into evidence of a defendant's refusal to submit to alcohol testing does not violate his right against self-incrimination.

b. It is not fundamentally unfair and does not violate a defendant's due process rights to use his refusal as evidence of guilt, even if police failed to so warn him.

2. *State v. Smith*, 105 Nev. 293, 774 P.2d 1037 (1989)
   The Fifth Amendment only protects violations of compelled testimony, not physical evidence, i.e. breath samples, so the breath samples that were obtained without "Mirandizing" the defendant did not require suppression.

E. A refusal to answer can serve as the basis of a negative inference in an administrative proceeding:

1. *DeBonis v. Corbisiero*, 155 A.D.2d 299, 547 N.Y.S. 2d 274 (1989)
   A licensed owner and trainer of thoroughbred horses had his license revoked after invoking his Fifth Amendment right not to testify at an administrative hearing. The court held that although invocation of the Fifth Amendment during criminal proceedings cannot be used against the accused, in a civil or administrative proceeding, such invocation "may for the basis of an adverse factual inference." (citing *Baxter v. Palmigiano*, 425 U.S. 308 (1976)).

5th amendment 6

V. *Miranda* Warnings

The *Miranda* doctrine provides that testimonial evidence gained from "custodial interrogation" may not be used to prosecute a defendant in a ***criminal*** proceeding unless certain procedural safeguards have been utilized, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966).

A. *Miranda* and Roadside Stops

1. *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984): Normal pre-arrest roadside questioning and tests of motorists detained for routine traffic stops was not custodial interrogation for *Miranda* purposes. "A single police officer ask(ing) respondent a modest number of questions and request(ing) him to perform a simple balancing test at a location visible to passing motorists" was not custodial interrogation for *Miranda* purposes.
2. *Pennsylvania v. Bruder*, 488 U.S. 9 102 L.Ed.2d 172, 109 S.Ct. 205 (1988): The court reaffirmed its decision in *Berkemer* holding that the "noncoercive aspects of ordinary stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*."

5th amendment 7

3. *Pennsylvania v. Muniz*, 496 U.S. 582, 110 L.Ed.2d 528, 110 S.Ct. 2638 (1990):
   A motorist's answers to the questions concerning his name address, height, weight, eye color, date of birth and current age do amount to forms of custodial interrogation, but these questions fall within a "routine booking" exception which exempts them from the warnings required by *Miranda v. Arizona*. A motorist's voluntary comments upon his or her state of inebriation do not constitute custodial interrogation, for purposes of *Miranda*, if the response was prompted by routine procedures (such as administering implied consent rights) rather than interrogation.
4. *South Dakota v. Neville*, 459 U.S. 553, 74 L. Ed.2d 748, 103 S.Ct. 916 (1983):
   Police inquiry as to whether a suspect will take a blood alcohol test is not an interrogation within the meaning of *Miranda*.
5. *State v. Smith*, 105 Nev. 293, 774 P.2d 1037 (1989):
   Breath samples obtained without "Mirandizing" defendant did not require suppression of breath samples. The 5th Amendment only protects violations of compelled testimony, not physical evidence such as a breath or blood sample.
6. *Dixon v. State*, 103 Nev. 59, 737 P.2d 1162 (1987):

Miranda warnings are not necessary before reasonable questioning and administration of field sobriety tests at a normal roadside traffic stop.

5th amendment 8

B. Driver Admissions, *Miranda* and Administrative License Suspensions

1. *State Department of Motor Vehicles v. Tilp*, 107 Nev. 288, 810 P.2d 771 (1991): A Department of Motor Vehicles revocation hearing is a civil proceeding and statement made by the defendant is admissible without a *Miranda* warning.
2. *State Department of Motor Vehicles v. McLeod*, 106 Nev. 852, 801 P.2d 1390 (1990): Because a driver's license revocation hearing is a civil proceeding rather than a criminal prosecution, statements made without *Miranda* warnings are admissible.

6th amendment 1

VI. 6th Amendment: Confrontation Clause and Right to Counsel

Amendment 6 to the U.S. Constitution states:

> "In all ***criminal prosecutions***, the accused shall enjoy the right.…***to be confronted with the witnesses against him***…."

The U.S. Supreme Court has never extended this absolute right of confrontation to civil, administrative hearings, nor has there been a blanket extension of confrontation rights by other federal or state courts for administrative license suspension hearings:

A. In *Peretti v. National Transportation Safety Board (NTSB), Federal Aviation Administration (FAA)*, 999 F.2d 548 (10th Circuit, 1993), "By its own unequivocal terms, the constitutional right of confrontation applies only "in all criminal proceedings"."(Citing: *Hannah v. Larch*, 363 U.S. 420, 440 n.16 (1960); *Rosenthal v. Justices of Supreme Court of California*, 910 F.2d 561, 565 (9th Cir.1990), *cert. denied*, 111 S.Ct. 963 (1991); *Schultz v. Wellman*, 717 F.2d 301, 307 (6th Cir.1983), and *SEC v. Jerry T. O'Brien Inc.*, 467 U.S. 735, 742 (1984).

B. In *Arnett v. Office of Administrative Hearings*, 49 Cal. App. 4th 332, 56 Cal. Rptr. 2d 774 (3d Dist. 1996), the court held that there is no absolute right for the defendant to be physically present at the administrative hearing in order to confront his accusers.

C. See also, *Nevada Department of Motor Vehicles v. Vezeris*, 102 Nev. 232, 720 P.2d 1208 (1986), *Butera v. Apfel*, 173 F.3d 1049 (7th Cir. 1999), and *Davis v. Public Employees' Retirement System*, 750 So. 2d 1225 (Miss. 1999).

6th amendment 2

The **6th Amendment** also provides: **"In all criminal prosecutions, the accused shall… have the assistance of counsel for his defense."**

Is there a right to counsel prior to a chemical test being administered?

Whether an individual has the right to consult with an attorney prior to submitting to a chemical test for intoxication varies from state to state:

•*McCharles v. State Dept. of Motor Vehicles*, 99 Nev. 831, 673 P.2d 488 (1983),

•*Robertson v. State*, 109 Nev. 1086, 863 P.2d 1040 (1993): Individuals arrested

• for DUI do not have the right to speak to an attorney prior to submitting to a

•chemical test for intoxication.

•A chemical test is not a "critical stage" of a criminal proceeding. No violation of

•Fifth or Sixth Amendment rights

•occurs if a suspect is required to submit to a test before consulting an attorney.

•*Nyflot v. Minnesota Commissioner of Public Safety*, 474 U.S. 1027, 88 L.Ed.2d 567, 106 S.Ct. 586 (1985): Nyflot had her driver's license revoked for failing to submit to an evidentiary test and appealed to the Supreme Court arguing that she had a Sixth Amendment right to counsel before deciding whether to take a test a ticket could act as a complaint and could be issued before the test was conducted, i.e. "critical stage" of a process.) The Court dismissed the case for want of a substantial federal question.

6th amendment 3

See similar rulings in: *Forman v. Motor Vehicle Admin.*, 332 Md. 201, 630 A.2d 753 (1993); *Dept. of Transportation v. O'Connell*, 555 A.2d 873 (Pa. 1989); *Dept. of Highways v. Becky*, 192 N.W.2d 441 (Min.1971); *State v. Severino*, 537 P.2d 1187 (Hawaii 1975); *Graham v. State*, 633 P.2d 211 (1981); *Ehrlich v. Backes*, 477 N.W.2d 211 (N.D. 1991).
On the other hand:*State v. Spencer*, 305 Or. 59 (1988): State appealed from a pretrial order of Lane Co. District Court suppressing defendant's breath tests results, and defendant cross-appealed. The Court of Appeals, 82 Or.App. 358, 728 P.2d 566, reversed and remanded on appeal and affirmed on cross-appeal. On review, the Supreme Court, Gillette, J., held that: (1) implied consent law does not require that driver be given access to
•counsel before submitting to breathalyzer examination; (2) under state constitutional
•right to counsel, arrested driver has right upon request to reasonable opportunity to obtain
•legal advice before deciding whether to submit to breath test; and (3) defendant
•monstrated sufficient causal relationship between denial of access to counsel and
•obtaining of breath sample, if any needed to be
•shown, to require exclusion of breath test results.